raised in the original appeal, the petitioner has no appeal remedy to bring these matters before the Supreme Court of the State of Illinois.

It is, then, the prayer of the petitioner herein, Don R. Lego, that this court accord a proper hearing upon the issues of the petition and appoint counsel from the Federal Defenders office to represent his case herein.

Respectfully

/s/ Don R. Lego
DON R. LEGO #48138

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Habeas Corpus No. ———

UNITED STATES OF AMERICA, EX REL. DON RICHARD LEGO,
PETITIONER-APPELLANT

vs.

FRANK J. PATE, Warden etc., RESPONDENT-APPELLEE
On Petition for Writ of Habeas Corpus to the

United States District Court for the Northern
District of Illinois, Eastern Division

HONORABLE HUBERT L. WILL, Judge Presiding

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

This cause comes before the court to be heard upon the petition of, *Don R. Lego*, for the issuance of a Federal Habeas Corpus Writ and for leave to be allowed to proceed in this court with the appointment of counsel assigned by this court from the Federal Defenders office.

JURISDICTIONAL STATEMENT

This court has jurisdiction to adjudicate the instant petition for writ of habeas corpus pursuant to the provisions of 28 U.S.C. 2241-2243.

EXHAUSTION OF STATE REMEDIES

The petitioner herein has exhausted every available state remedy before coming to this court with respect to the contentions of the instant petition for writ of habeas corpus. The Illinois Supreme Court affirmed the judgment of the trial court in People vs. Lego, 32 Ill. 2d 76; likewise the Circuit Court of Cook County has heretofore denied both post conviction and habeas corpus relief pursuant to Illinois Revised Statues, Chapter 38, and Chapter 65 respectively.

PRIOR FEDERAL HABEAS CORPUS PROCEEDINGS

The Federal District Court, Will, J, denied the petitioner habeas corpus relief in this court in prior petitions filed herein; however, the contention raised in the instant petition deals with issues not heretofore presented to this court in any prior proceedings herein. It is perhaps, noteworthy, to suggest to the court that in all the prior proceedings heard in this court, the petitioner has been denied the assistance of counsel to represent his proceedings herein.

STATEMENT OF JUDGMENT

The habeas applicant, *Don R. Lego*, was arrested in Alsip, Illinois on the first day of January, 1961 and charged with the offense of robbery etc. The arresting officers immediately took the petitioner to the police station and subjected him to police interrogation. At the conclusion of approximately (4) hours of interrogation, the petitioner was asked to sign a confession reduced to writing.

The petitioner refused to sign the confession and requested that he be allowed to call an attorney; the confession concludes in its substance: "no, I refuse to sign this statement. I want to see a Doctor and attorney".

Thereafter the petitioner was indicted by the Cook County Grand Jury and the case came on for a jury trial before the Honorable Leslie Salter; that, prior to the trial on the merits, defense counsel moved that the confession be suppressed for reason that such confession had been attained from the petitioner in violation of his constitutional rights.

At the conclusion of the hearing on the motion to suppress, the trial court denied the motion and the confession was thereafter read to the jury. The jury returned a verdict of guilty and the petitioner was, thereafter sentenced to the Illinois state penitentiary.

This court (the federal district court) after examining the state court record of proceedings concluded: (1) that the confession itself concludes with the defend-

ants request to be allowed to call an attorney; (2) that the confession was not signed by the defendant; (3) that nothing in the records alludes to the effect that the defendant was admonished as to his constitutional rights by the interrogating officers.

After making such conclusions of law and finding of facts, this court denied the prior petitions filed herein (see the decisions of the district court filed in this case.

INTERVENING CASE LAW

The Supreme Court of the United States in Jackson vs. Denno, 378 U.S. 368, 377, 84 Sup. Ct. 1774, 1781 (1964) promulgated a set of rules for the States to follow in having the voluntary character of a confession determined. It is with respect to that case and its required procedures for the determining of whether a confession is admissible as evidence that the petitioner brings the instant petition to this Court.

* * * *

CONCLUSION

Under Townsend vs. Sain, 372 U. S. at 212-213, this court may decide the instant petition for writ of habeas corpus making finding of facts and conclusions of law applying correct constitutional standards.

Respectfully submitted,

/s/ Don R. Lego
Petitioner
Box 112, Joliet, Illinois

Subscribed and sworn to before me this 4 day of April, 1969.

/s/ Elwin J. Meyer
Notary Public

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

69 C 754

[Filed Apr. 15, 1969, Elbert A. Wagner, Jr., Clerk]

UNITED STATES OF AMERICA EX REL.
DON RICHARD LEGO, #48138, PETITIONER

v.

FRANK J. PATE, Warden, RESPONDENT

MEMORANDUM OPINION

Petitioner is presently serving a sentence of twenty-five to fifty years in the Illinois State Penitentiary at Joliet, Illinois. This sentence was imposed by the Circuit Court of Cook County on February 24, 1961, following the petitioner's conviction by a jury of the criminal offense of Armed Robbery. This conviction was subsequently affirmed by the Supreme Court of Illinois. *People* v. *Lego*, 32 Ill.2d 76, 203 N.E.2d 875 (1965).

The instant petition for a writ of habeas corpus alleges that the procedure employed by the trial court to determine the admissability of a confession introduced against him was unconstitutional. Prior to the trial on the merits the petitioner made a motion to suppress an oral confession which had been reduced to writing, contending that the confession was given as a result of coercion by the police. After a separate hearing on this issue, the court denied the motion and the confession was subsequently received into evidence during petitioner's trial. Petitioner asserts that this procedure was unconstitutional because the trial court was not required to find the voluntariness of the confession to be beyond a reasonable doubt before its admission into evidence. Further, he asserts that the procedure employed by the trial court did not afford him a fair hearing on the issue since he did not have the right to attack the voluntary character of the confession before the jury.

This Court does not reach the merits of these contentions. Federal habeas corpus is designed to provide a remedy for those who have been subjected to state prosecution in violation of their federal rights. However, section 2254 of Title 28 of the United States Code limits the issuance of the writ to those instances in which the petitioner has exhausted his state remedies or clearly demonstrated the unavailability of state corrective processes.

This provision has been construed to require that a petitioner fulfill at least two general conditions before requesting a writ of habeas corpus in a federal court. First, he must have sought relief in each court of the State court hierarchy in which a remedy is available. *See, e.g., Barry* v. *Sigler*, 373 F.2d 835, 838 n. 3 (8th Cir. 1967); *Morehead* v. *State of California*, 339 F.2d 170, 171 (9th Cir. 1964); *Thompson* v. *Peyton*, 280 F. Supp. 210 (W.D. Va. 1968); *United States ex rel. Lyle* v. *Carney*, 277 F. Supp. 250 (W.D. Pa. 1967). Second, it must be shown by the petitioner that exactly the same points urged in the federal court were previously raised in these State courts. *See, e.g., United States ex rel. Waldron* v. *Pate*, 380 F.2d 94 (7th Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968); Rose v. Dickson, 327 F. 2d 27 (9th Cir. 1964); *United States ex rel. McDonald* v. *Deegan*, 284 F. Supp. 166, 167 (S.D.N.Y. 1968); *Application of Ortega*, 158 F. Supp. 946, 948 (N.D. Ill. 1957), *cert. denied*, 359 U.S. 928 (1959). If either of these conditions is unfulfilled, the application for a writ of habeas corpus must be denied.

At the present time, it appears that petitioner has not satisfied these conditions. Although the petitioner raised the admissibility of his confession in his appeal to the Supreme Court of Illinois, an examination of the Court's opinion does not reveal any consideration of the questions which he raises in the instant petition. Apparently, the sole ground on which the petitioner challenged the admissibility of the confession in the state court proceedings was that the prosecution had failed to call all the witnesses to the confession or to satisfactorily account for their absence. *People* v. *Lego*, 32 Ill.2d 76,

79-80, 203 N.E.2d 875, 878 (1965). While the opinion of the Court reveals that it found the trial court's ruling "was not against the manifest weight of the evidence," nothing therein indicates that the constitutionality of this standard was ever in dispute. Similarly, the opinion does not suggest that the petitioner asserted any right to challenge the voluntary character of the confession before the jury.

This Court cannot assume that the Illinois Supreme Court had an opportunity to explore and determine these questions on petitioner's appeal. Indeed, the burden is on the petitioner to show that the questions which he seeks to raise in this proceeding were also raised in the state courts. *See United States ex rel. Sproch* v. *Regan*, 246 F.2d 264, 266-67 (7th Cir. 1957).

Since the petitioner has failed to demonstrate that the Illinois courts have had an opportunity to consider and decide the questions presented in his application for a writ of habeas corpus, the application must be dismissed. An appropriate order will enter.

/s/ Hubert L. Will
United States District Judge

Dated: April 15, 1969

April 24, 1969

[Filed Apr. 28, 1969, Elbert A. Wagner, Jr., Clerk]

Re: U.S.A. ex rel. Don Lego vs.
Frank J. Pate, Warden
Habeas Corpus No. 69c754

Honorable Hubert L. Will
United States District Judge
U. S. Court House
Chicago, Illinois

Dear Judge Will:

I am submitting attached hereto my petition for a rehearing with respect to your order of April 15, 1969, denying my petition for a writ of Habeas Corpus. In your order denying the petition you stress that such petition should be denied unless it is clearly demonstrated that there is an "unavailability of state corrective processes."

In my petition for rehearing I point out the fact that the identical issues as is raised in my petition for writ of habeas corpus was, in the first instance, presented to the Circuit Court of Cook County in both state habeas corpus and post conviction proceedings; also, that the trial court denied relief in those proceedings holding that both the old issues and the new issues of the petitions were res judicata because of the fact that the state Supreme Court had affirmed my conviction on direct appeal (People vs. Lego, 32 Ill. 2d 76)

Since I have presented the identical issues in the Circuit Court of Cook County under the aforementioned remedies, I have no further remedies in the lower trial court. Likewise, since the new issues raised were not developed at the time of my direct appeal to the Supreme Court, that court could not pass upon the "new issues" in the direct appeal.

Since I am allowed only one appeal from the judgment of the trial court to the Supreme Court of Illinois; and since I have used that appeal right prior to the developing of the new issues, I cannot now obtain another appeal to the Appellate courts of Illinois and have the new issues resolved there.

It is Apparent, therefore, that I have used my available state remedies with regard to the new issues concerning whether the fact finding process for the determining of confessions in Illinois violates due process standards. For these reasons I respectfully submit my petition for reconsideration of your order of April 15, 1969, and respectfully pray thereby that a rehearing be accorded and at which time the habeas application will be decided on the merits.

Respectfully submitted,

/s/ Don Richard Lego
DON RICHARD LEGO #48138
Box 112, Joliet, Illinois

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

69 C 754

[Filed Jan. 13, 1970, Elbert A. Wagner, Jr., Clerk]

UNITED STATES OF AMERICA, EX REL. DON RICHARD LEGO, PETITIONER

v.

FRANK J. PATE, Warden, RESPONDENT

MEMORANDUM OPINION

Petitioner is presently incarcerated in the Illinois State Penitentiary, Stateville Branch, pursuant to his conviction by the Criminal Court of Cook County for the offense of Armed Robbery. Petitioner was tried before a jury and found guilty on February 24, 1961. He was sentenced by the court to a term of not less than 25 or more than 50 years. Following his conviction, petitioner appealed directly to the Illinois Supreme Court. That Court affirmed the judgment of the trial court. *People* v. *Lego*, 32 Ill.2d 76 (1965). Petitioner has also sought post-conviction relief via both post-conviction and habeas corpus (federal and state) petitions.[1] Petitioner has heretofore sought habeas corpus relief in this Court. We denied petitioner's latest petition on April 15, 1969, and he comes now upon a petition for rehearing, asking us to reconsider our order of April 15.

Petitioner reiterates that the identical issues raised in his earlier petition were presented to the Cook County Circuit Court. He further states that his post-conviction petition and state habeas corpus petition were denied on the ground that consideration of both the old and the

[1] Post-conviction petition #1167, on July 20, 1961, before Judge Salter, Denied; Post-conviction #1417, on February 16, 1967, before Judge Power, Denied; and State Habeas Corpus petition #45391, on August 14, 1968, before Judge Fitzgerald, Denied.

new issues was precluded by the doctrine of *res judicata* because of the Illinois Supreme Court's affirmance of petitioner's conviction on direct appeal. *People* v. *Lego*, *supra*. Petitioner submits that he has exhausted his presently available state court remedies as required by 28 U.S.C. 2254.

Upon reconsideration, we agree with petitioner. We do so for two reasons. First, at the time the April opinion was filed we were of the opinion that, since petitioner raised only the question of the admissibility of his confession in his appeal to the Supreme Court of Illinois and not the issue raised here, he had not exhausted. We adopted this position because it was assumed at that time that petitioner could avail himself of Ill. Rev. Stats., ch. 38, section 122-7, and could seek review of the new issues by having the Illinois Supreme Court review the dismissal of the recent post-conviction hearing petition. After a more thorough examination of section 122-7 we realize that, although the section permits a review of any final judgment entered upon a petition for a post-conviction hearing, such review must proceed "as an appeal in civil cases," because a post-conviction hearing proceeding is civil in nature. Therefore, petitioner must file a notice of appeal within 30 days. (S.H. Ill. Ann. Stats., Ch. 110A sec. 303(a)). This section allows an appeal only within its 30 day time limitation. It does not permit, as did an earlier section, an appeal within one year by order of the reviewing court entered within 14 months from the entry of the order, decree, judgment or other determination. Because petitioner did not prosecute a notice of appeal within the prescribed time, he no longer has available this state court remedy.

Second, because a petition for a State writ of habeas corpus may be filed either originally in the Supreme Court or in the Circuit Court, a denial of a habeas corpus petition by a state Circuit Court in Illinois is not reviewable by the Illinois Supreme Court. *White* v. *Ragen*, 324 U.S. 760 (1945), rehearing denied 326 U.S. 807. This rationale corroborates the enunciated intent of the Illinois post-conviction hearing remedy. This

remedy is intended to be the complete post-conviction remedy for persons convicted of crimes and who claim that the proceedings contained constitutional violations. *People* v. *Gragg*, 16 Ill.2d 336, 157 N.E.2d 57, 1959. Thus, petitioner is presently without any available state remedy as he cannot appeal from either the Circuit Court's denial of his State habeas corpus petition or from the denial of his post-conviction hearing petition. Because petitioner is without any state court remedy we must consider the merits of his contentions.

Petitioner alleges that the Illinois evidentiary procedure for determining the voluntariness of extra-judicial confessions is so unreliable as to contravene his Fourteenth Amendment right to due process. Specifically, petitioner contends that, since the trial judge in the preliminary determination of voluntariness outside the presence of the jury is not required to find beyond a reasonable doubt that the confession was voluntary, the procedure is unconstitutional. He further avers that since he did not have the right to attack the voluntary character of the admitted confession before the jury, he was denied due process of law. The latter contention is unfounded and we need not discuss it more fully than to say that it is without merit because petitioner took the stand in his own defense and introduced the same evidence to attack the credibility of his confession that he used in the preliminary hearing to attack its voluntariness. (See record pp. 223-226). In addition, the jury was given the usual beyond a reasonable doubt instruction.

Respondent argues that the Illinois procedure which determined the voluntariness of petitioner's extra-judicial confession is not unreliable and therefore did not deny him Fourteenth Amendment due process. Petitioner's argument is predicated upon the fact that the state of Illinois does not require the trial judge to find voluntariness beyond a reasonable doubt. Petitioner's argument is interesting but incorrect, for a sufficiency test cannot be applied to questions of admissibility.

Illinois traditionally has required the trial court to pass on evidentiary questions and, as a consequence, a confession can become competent evidence only when it

is voluntary. *People* v. *Miller*, 13 Ill.2d 78, 91 (1958); *People* v. *Thomlinson*, 400 Ill. 555 (1948). Moreover, a confession becomes admissible only after its voluntariness has been determined by the trial judge at a hearing outside the presence of the jury. *See, e.g., People* v. *Miller, supra*, at 95; *People* v. *Fox*, 319 Ill. 606 (1926); *People* v. *Guido*, 321 Ill. 397 (1926); *People* v. *Lindsay*, 412 Ill. 472 (1952); *People* v. *Sloss*, 412 Ill. 61 (1952); *People* v. *Hall*, 413 Ill. 615 (1933).

In *Jackson* v. *Denno, supra*, at pp. 382-3, 386, 388, 392 and 395, the Supreme Court recognized that the issue of voluntariness was evidentiary and its admissibility was for the court, stating, ". . . it is only a reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant and which would permit the jury to consider the confession in adjudicating guilt or innocence." (p. 387) Since confessions are evidentiary, requiring that a reasonable doubt standard be applied by the court would be an exception to and a departure from the court's normal role in the process of admitting evidence.

Notwithstanding that it is an exception to the normal evidentiary standard of relevance, some courts have required a "beyond a reasonable doubt" standard to be applied in determining questions of voluntariness.[2] These jurisdictions in insisting upon the higher standard confuse the admissibility of evidence with the sufficiency of proof. Such confusion is unfortunate for it effectively

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[2] Minority, *e.g.*,—*Mullens* v. *United States*, 382 F.2d 258 (4th Cir. 1967); reaffirming *United States* v. *Inman*, 352 F.2d 954 (4th Cir. 1965); *Pea* v. *United States*, 397 F.2d 627 (D.C. Cir. 1968); *Fernandez* v. *Beto*, 281 F.Supp. 207 (N.D. Tex. 1968); *State* v. *Ragsdale*, 249 La. 420 (1966), cert. den. 385 U.S. 1029 (1967); *State* v. *Keiser*, 274 Minn. 265 (1966); *Lee* v. *State*, 236 Miss. 716 (1959); *State* v. *Longmore*, 178 Neb. 509 (1965); *State* v. *Yough*, 49 N.J. 587 (1967); *People* v. *Huntley*, 15 N.Y.2d 72 (1965); *State ex rel. Goodchild* v. *Burke*, 27 Wis.2d 244 (1965), cert. den. 384 U.S. 1017 (1966); *State* v. *Thundershield* (S.D. 160 N.W.2d 408 (1968); *Commonwealth* v. *Mayhew*, 297 Ky. 172 (1943); *People* v. *Stroud*, 78 Cal. Rptr. 270 (1969); *State* v. *Davis*, 438 P.2d 185 (Wash. 1968).

clouds the real issue, i.e., whether the particular piece of evidence meets the requisites of admissibility.

The admissibility of any evidence should not and does not bear any relationship to the ultimate question of the sufficiency of the proof. Instead, the real concern should be whether the proffered evidence is relevant and probative. It is, of course, legend that a confession is relevant and material, but the voluntariness issue contains no special circumstances requiring specialized standards. What has troubled courts in the past is the difficulty of ascertaining the reliability of the jury's determination of voluntariness. To alleviate this uncertainty and possible taint, the independent hearing procedure was established. Thus, our focus must rest upon a consideration of the procedure used in determining whether or not a confession can be admitted.

Because the defendant can introduce during the trial the same evidence that he introduced at the hearing to challenge the confession's voluntariness, no prejudice can result; and even though a confession may be a key item in proving a defendant's guilt, that fact alone without more cannot elevate the standard of its admissibility to a constitutional level. Additional factors which might invoke the use of such a standard, such as prejudice, ineffective procedures or prosecutorial bias, do not exist. Voluntariness is the sole question. In the instant case, a preliminary hearing, outside the presence of the jury, was held and the trial court upon a presentation of the facts surrounding the confession, denied defendant's motion to suppress and admitted the confession. The judge's denial necessarily indicated that he found the confession to be voluntary. Our examination of the trial record indicates that the petitioner received a full and fair hearing and a determination of the confession's voluntariness absent any consideration of its veracity. In so doing, the trial court applied the constitutional requisites of *Jackson* v. *Denno*, *supra*.

Since we understand voluntariness to be synonomous with admissibility, no other standard is required than that which is normally used to determine the admissibility of evidence. We hold, therefore, that the trial judge

is not required to utilize the "beyond a reasonable doubt" standard when he ascertains voluntariness. Petitioner's test can and should only apply to the total effect of the evidence, i.e., as to the guilt or innocence of the defendant. It is important, too, to understand that the constitutional guarantee of *Jackson* v. *Denno* is solely a procedural assurance that the admissibility of a confession will be determined in a full and fair proceeding outside the presence of the jury. This proceeding guarantees to the petitioner at least one forum where the voluntariness issue can be evaluated without any regard to its truth. Thus, Jackson does not purport in any way to change, alter or amend the relevancy test for admissible evidence.

Because the hearing procedure in no way alters the traditional test and because we find no compelling constitutional or practical reason to establish new standards for determining whether or not something may be introduced into evidence, we must deny petitioner's petition for a writ of habeas corpus. An appropriate order will enter.

/s/ Hubert L. Will
United States District Judge

Dated: January 13, 1970

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

69 C 754

[Filed Feb. 10, 1970, Elbert A. Wagner, Jr., Clerk]

UNITED STATES OF AMERICA EX REL. DON R. LEGO, PETITIONER

v.

FRANK J. PATE, Warden, RESPONDENT

IN RE CERTIFICATE OF PROBABLE CAUSE FOR APPEAL AND PETITION TO PROCEED IN FORMA PAUPERIS

Petitioner, Don R. Lego, seeks to appeal the order entered by this Court on January 13, 1970, denying his petition for habeas corpus relief.

This Court dismissed his petition because petitioner's contention, i.e., that the trial judge in his preliminary determination of the voluntariness of the confession need not find voluntariness beyond a reasonable doubt, was without merit. Petitioner again asserts the same argument and he interprets one of the sentences of this Court's January 13, 1970 opinion to be a recognition by this Court that other district courts do in fact employ such a standard. He submits, therefore, that this Court should issue a certificate of probable cause allowing the petitioner an appeal to have resolved what he calls "an apparent conflict."

Petitioner, while relying on language from our opinion, fails to correctly interpret the context of that statement. The statement, "Notwithstanding that it is an exception to the normal evidentiary standard of relevance, some courts have required a beyond a reasonable doubt standard to be applied in determining questions of voluntariness . . ." was offered to illustrate the confusion which the other circuits have created by failing to carefully delineate the differences which do exist between the

standard applied when determining a question of the admissibility of a piece of evidence and when determining the standard that should be applied when evaluating the weight of all the evidence.

While we are of the opinion that our decision of January 13, 1970 deals carefully and thoroughly with petitioner's contention, a determination of the question by the Court of Appeals would be helpful. Therefore, petitioner's petition for a certificate of probable cause and leave to proceed in forma pauperis is granted. An appropriate order will enter.

/s/ Hubert L. Will
United States District Judge

Dated: February 10, 1970

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

October 8, 1970

BEFORE HON. LUTHER M. SWYGERT, *Chief Judge*
HON. JOHN S. HASTINGS, *Senior Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*

No. 18313

UNITED STATES OF AMERICA, EX REL. DON RICHARD LEGO,
PETITIONER-APPELLANT

vs.

FRANK J. PATE, Warden, RESPONDENT-APPELLEE

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

ORDER

Petitioner-appellant Don Richard Lego is presently confined in an Illinois penal institution pursuant to a judgment of conviction by an Illinois state court finding him guilty of a charge of armed robbery. On appeal, the judgment of conviction was affirmed by the Illinois Supreme Court. People v. Lego, 32 Ill. 2d 76, 203 N.E. 2d 875 (1965). Two state post-conviction petitions for relief were denied, as were state and federal habeas corpus petitions. The federal habeas petition was denied by the District Court for the Northern District of Illinois, Honorable Hubert L. Will presiding, on April 15, 1969. Subsequently, Judge Will granted a petition for rehearing and after full and complete consideration entered an order denying petitioner's petition for a writ of habeas corpus. Judge Will's able memorandum opinion fully sets forth the issue before us on appeal and is

reported as United States ex rel. Lego v. Pate, N.D. Illinois E.D., 308 F. Supp. 38 (1970). The issue here is whether the Illinois trial court, in determining the voluntariness of petitioner's extra-judicial confession, used an evidentiary procedure so unreliable as to contravene petitioner's Fourteenth Amendment right to due process. The district court held in the negative. We affirm.

Petitioner appears in this appeal *pro se*. We ordered the case submitted on the record and briefs, without oral argument. On the authority of Judge Will's reported memorandum opinion, *supra*, which we approve and adopt, the judgment below denying petitioner's petition for a writ of habeas corpus is now affirmed. It is so ordered.

AFFIRMED.

IN THE CRIMINAL COURT OF COOK COUNTY

Indictment No. 61-111-112

PEOPLE OF THE STATE OF ILLINOIS

—vs—

DON RICHARD LEGO

MOTION TO SUPPRESS CONFESSION

Now comes your petitioner, DON RICHARD LEGO, and moves this Honorable Court to suppress any statements oral or written taken from your petitioner and attempted to be introduced in evidence by the prosecution in the above matter, by reason of the fact that said statements were given by your petitioner under duress, violence, and threats, and were not freely and voluntarily made by your petitioner, DON RICHARD LEGO.

THEREFORE, under the laws of the State of Illinois and the Constitution of the United States, your petitioner demands that said statements be suppressed and not be permitted to be received into evidence in the above entitled cause.

/s/ Don Lego
Petitioner

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

DON RICHARD LEGO, being first duly sworn on oath deposes and says that he has read the foregoing petition by him subscribed, and that the contents therein set forth are true, except as to the matters which are stated on information and belief, and as to those matters he believes them to be true.

/s/ Don Lego

Subscribed and Sworn to before me this 21 day of February A.D. 1961.

/s/ [Illegible]
Notary Public

[Filed Feb. 21, 1961, John J. Altman,
Clerk of Criminal Court]

And the Court hearing the Testimony of Witnesses.

And the Court hearing Counsel for said Defendant in support of said motion to Suppress Confession as well as the State's Attorney, Counsel for the People, in opposition thereto and the Court being fully advised in the premises, doth DENY said motion and orders that said motion in this cause be and the same is hereby DENIED accordingly.

PLEA of NOT GUILTY heretofore entered to the indictment in this cause.

And now issue being joined, it is ordered that a Jury come. Thereupon come a Jury of good and lawful men and women, to-wit:

Fred. Bartizal	Howard J. Elliott
Margaret Delaney	Anna Koenigshofer
Toby Joseph Apicella	Stephanie M. Chocola
Margaret Douglas	William H. Caldwell
Ada Browne	Emily F. Cramer
Francis Buczkowski	James M. Keivers

who were duly impaneled and sworn.

It is ordered by the Court that this cause be and the same is hereby continued to February 23rd, A. D. 1961.

* * * *

[fol. 89] THE COURT: The motion to suppress the confession is denied.

The petitioner has admitted under oath he had a struggle with the complaining witness over the gun; he was wounded, obtained a facial wound. The Officers testified he was bloody at the time he was arrested.

I don't believe the defendant's testimony at all that he was beaten up by the Police. The condition he is in is well explained by the defendant himself. The Motion to suppress is denied.

Call a jury. Bring in a jury. Call a jury.

* * * *

[fol. 91] THE COURT: * * *

* * * *

The issue in this case for your determination is whether or not the defendant is guilty as charged in the indictment. If selected as jurors in this case and before retiring for your deliberations the Court will [fol. 92] fully advise you as to the law in the case in the form of written instructions which will be read to you and which you may take with you to your jury room.

* * * *

The law in this case will be given to you by the Court [fol. 93] and you are bound to take the law as the court gives it to you and apply it to the facts in the case as you find them.

The defendant is presumed to be innocent and that presumption stays with him throughout the trial until

and unless it is overcome by evidence which convinces you of his guilt beyond a reasonable doubt. The burden of proof is on the State to prove the defendant guilty beyond a reasonable doubt and that burden never shifts.

* * * *

[fol. 272] The jury are the sole judges of the facts in the case, the credibility of the witnesses, and the weight to be given to their testimony. * * *

GIVEN:

* * * *

[fol. 273] The jury are the sole judges of the credibility of the witnesses. Your verdict will not necessarily be determined by the number of witnesses testifying for either side. You may take into consideration the number of witnesses testifying in support of or against any fact or state of facts, the opportunities of the several witnesses for knowing the things about which they testify, their conduct and demeanor while testifying; their age, discretion and experience; their bias or lack of bias, their interest, if any, in the result of the trial, the probability or improbability of the truth of their several statements; the relation which they bear to either side and the extent to which any witness is contradicted or corroborated by any other credible evidence, if at all, and any evidence that tends to shed light on his or her credibility.

The same tests hereinabove given are to be applied to the testimony given by the defendant. You have no right to disregard the testimony of the defendant simply because he is accused of crime.

GIVEN:

[fol. 274] The indictment in this case is not to be considered as any evidence or presumption of guilt against the defendant. It is a mere formal charge necessary to place the defendant upon trial. The defendant under the law is presumed to be innocent of the charge in the indictment and this presumption remains throughout the trial with the defendant until you have been satisfied by the evidence in the case beyond all reasonable doubt

of the guilt of the defendant. This presumption of innocence is not intended to aid any one who is in fact guilty of crime to escape, but is a humane provision of the law intended, as far as human agencies can, to prevent an innocent person from being convicted. Throughout this case the burden of proving the guilt of the defendant beyond all reasonable doubt is on the State and the law does not require the defendant to prove his innocence.

If you are convinced from all the evidence in the case beyond all reasonable doubt that the defendant is guilty as charged in the indictment, it is your duty to find such defendant guilty. If you are not convinced from the evidence beyond all reasonable doubt of the guilt of the defendant, it is your duty to find such defendant not guilty.

* * * *

GIVEN:

SUPREME COURT OF THE UNITED STATES

No. 6046, October Term, 1970

DON RICHARD LEGO, PETITIONER

v.

JOHN TWOMEY, Warden

On petition for writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to question 1 as set forth in the petition which reads as follows:

"1. Was the Illinois evidentiary rule for determining the voluntariness of extra-judicial confessions so highly unreliable as to contravene the Appellant's Fourteenth Amendment Due Process rights and, necessarily, deprive the Appellant of the Fifth Amendments right against self-incrimination because:

(a) The trial judge in his preliminary determination, removed from the jury, need not find the confession voluntary beyond reasonable doubt when judging its admissibility as evidence for the jury; and

(b) The defendant, as a matter of Illinois law, was precluded from having the jury instructed upon, and to determine the voluntariness of the confession along with the other factual issues upon which the jury verdict must rest?"

March 29, 1971

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IN THE

Supreme Court of the United States

No. 70-5037

DON RICHARD LEGO,

Petitioner

v.

JOHN TWOMEY, Warden

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The order of the Court of Appeals affirming the denial of the petition for habeas corpus (App. 21-22) is unreported. The decision of the District Court dated January 13, 1970, denying the petition (App. 13-18) is reported at 308 F. Supp. 38. The earlier memorandum opinion of April 15, 1969 (App. 8-10) and the memorandum on application for a certificate of probable cause to appeal in forma pauperis